Modalku Ventures Sdn Bhd v E-Tech It Sdn Bhd (Able Enterprise (M) Sdn Bhd, third party)

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22NCC-303–06 OF 2022
ATAN MUSTAFFA J
20 SEPTEMBER 2023

Civil Procedure — Summary judgment — Triable issues — Whether defendant failed to raise triable issue or reasonable defence to plaintiff's summary judgment application — Whether plaintiff's application to strike out defendant's counterclaim under O 18 r 19 of the Rules of Court 2012 had to be allowed — Whether counterclaim merely repeated same issues defendant had raised to oppose summary judgment application which court found were devoid of merit

The matters before the court were: (a) a summary judgment application ('encl 8') by the plaintiff ('P') under O 14 of the Rules of Court 2012 ('the ROC') against the defendant ('D') for non-payment of a sum owing under invoices which the third party ('TP') herein had issued to D (the right to receive payment of which invoices TP had absolutely assigned to P); and (b) P's application ('encl 12') under O 18 r 19 of the ROC to strike out D's counterclaim against P. P had granted TP a financing facility. As security, TP had absolutely assigned to P the right to receive payment on invoices that TP had issued to the defendant in respect of the trade between them. Notice of the assignment was given to D which agreed to remit future payments on the invoices to a designated account specified by P. At all material times, D had failed to pay the sum of RM1,235,735.71 under the invoices ('the invoiced amount'). TP had given credit notes to D for the full amounts stated in ten of the invoices after receiving returns of goods from D on the basis that they were unsuitable or defective. When TP defaulted under the financing facility, P sued TP for the sum of RM1,027,424.07 owing under the facility. Separately, P sued D for payment of the invoiced amount. D raised a host of issues to oppose encl 8. P submitted that if encl 8 was allowed, encl 12 should also be allowed as D's counterclaim comprised the same arguments that D proposed to raise to oppose encl 8.

Held, allowing encls 8 and 12:

(1) D's contentions did not amount to triable issues or constitute any reasonable defence to the summary judgment application (see para 64).

(2) There was no triable issue in D's submission that the provisions of the notice of assignment had been varied by an alleged oral agreement between D and TP in respect of returned goods. Pursuant to ss 91 and 92

of the Evidence Act 1950, D could not use a purported verbal agreement between itself and TP to vary or modify the terms of the notice of assignment. Clause 3 of the notice of assignment also stated that the terms of the assignment could not be varied or modified without P's written consent thereto. There was no evidence of any such consent from P. P had no knowledge of any verbal agreement between D and TP with regard to returned goods. In any case, as P was not party to the alleged oral agreement or representations between D and TP, P was not bound by them and D was not released from its payment obligation under the notice of assignment (see paras 21–30).

(3) D could not rely on the Sale of Goods Act 1957 ('the SOGA') to avoid payment to P on the invoices. The evidence showed that D had acknowledged receiving the goods from TP in good condition. Pursuant to s 41 of SOGA, buyers could not challenge the quality or conformity of goods if they had the chance to inspect them on receipt but had not exercised that right. D's blaming of the Movement Control Order ('MCO') for its delay in inspecting and returning the goods was not acceptable because the MCO ended and was replaced by the National Recovery Plan as early as June 2021 whereas the return of the goods did not take place until 17 January 2022 (see paras 36–40).

(4) D had no right of independent or equitable set off in respect of the invoices as it had not met the requirement that its counterclaim must be closely connected to P's claim in the same transaction in order for equitable set off to operate. D's defence of equitable set off was mainly based on the return of the goods and the issuance of credit notes by TP. However, its counterclaim was based on the tort of abuse of process, which did not relate to the disputed invoices and did not meet the test for equitable set off. Even if the return of the goods and issuance of credit notes were considered as part of D's counterclaim, they were not closely connected to P's claim in the same transaction as D had kept the goods for a long time without reasonable explanation. D acknowledged the invoices and delivery order and therefore accepted its indebtedness to P which it failed to pay (see paras 43–44).

(5) P was entitled to pursue concurrent actions against D and TP. D did not dispute the validity of the deed of assignment and notice of assignment and admitted to being obliged to remit the debts payable under the invoices to P. The parties were therefore bound under those two documents and as long as the debts had not been fully satisfied, P was entitled to claim against both parties concurrently. The amount claimed against TP would reduce accordingly if P received the claimed amount from D and vice-versa. Hence, there was no question of multiplicity of

actions or violation of the rule against double recovery and s 25(2) of the Courts of Judicature Act 1964 did not apply to the instant case (see paras 45–47 & 49–50).

(6) The court did not accept D's argument that the inclusion of TP as a third party in the instant action constituted 'some other reason' for trial as per O 14 r 3(1) of the ROC. D's reason for including the third party was to prove the existence of an alleged verbal agreement between itself and TP. Even if such an agreement existed, it did not bind P or supersede the notice of assignment (see paras 60–61).

(7) As D's counterclaim was based on the allegations made in its defence to P's claim and the court had determined in the summary judgment application that D did not have a meritorious defence, the counterclaim was struck out for being frivolous, vexatious and an abuse of the court's process (see para 70).

[Bahasa Malaysia summary

Hal perkara yang dihadapkan ke mahkamah adalah: (a) permohonan penghakiman terus ('lampiran 8') oleh plaintif ('P') di bawah A 14 Kaedah-Kaedah Mahkamah 2012 ('KKM') terhadap defendan ('D') untuk tidak membayar jumlah terhutang di bawah invois yang telah dikeluarkan oleh pihak ketiga ('TP') kepada D (hak untuk menerima bayaran yang mana invois TP telah diserahkan sepenuhnya kepada P); dan (b) permohonan P ('lampiran 12') di bawah A 18 k 19 KKM untuk membatalkan tuntutan balas D terhadap P. P telah memberikan TP kemudahan pembiayaan. Sebagai sekuriti, TP telah menyerahkan sepenuhnya kepada P hak untuk menerima bayaran ke atas invois yang TP telah keluarkan kepada defendan berkenaan dengan perdagangan mereka. Notis penyerahan hak telah diberikan kepada D yang bersetuju untuk menghantar bayaran akan datang ke atas invois ke dalam akaun yang ditetapkan oleh P. Pada setiap masa material, D gagal untuk membayar jumlah RM1,235,735.71 di bawah invois ('jumlah invois'). TP telah memberikan nota kredit kepada D untuk jumlah penuh yang dinyatakan dalam sepuluh invois selepas menerima pemulangan barang daripada D atas dasar bahawa ianya tidak sesuai atau rosak. Apabila TP ingkar di bawah kemudahan pembiayaan, P telah menyaman TP untuk jumlah RM1,027,424.07 yang terhutang di bawah kemudahan tersebut. Secara berasingan, P telah menyaman D untuk pembayaran jumlah invois. D membangkitkan pelbagai isu untuk menentang lampiran 8. P menghujahkan bahawa jika lampiran 8 dibenarkan, lampiran 12 juga harus dibenarkan kerana tuntutan balas D terdiri daripada hujah yang sama yang dicadangkan D untuk membangkitkan untuk menentang lampiran 8.

Diputuskan, membenarkan lampiran 8 dan 12:

(1) Pengataan D tidak menjadi isu yang boleh dibicarakan atau membentuk

sebarang pembelaan yang munasabah kepada permohonan penghakiman terus (lihat perenggan 64).

(2) Tiada isu yang dibicarakan dalam hujahan D bahawa peruntukan notis penyerahan hak telah diubah oleh perjanjian lisan yang didakwa antara D dan TP berkenaan dengan barang yang dipulangkan. Menurut ss 91 dan 92 Akta Keterangan 1950, D tidak boleh menggunakan perjanjian lisan yang dikatakan antara dirinya dan TP untuk mengubah atau mengubah suai syarat notis penyerahan hak. Fasal 3 notis penyerahan hak juga menyatakan bahawa syarat penyerahan hak tidak boleh diubah atau diubah suai tanpa kebenaran bertulis P kepadanya. Tiada bukti sebarang persetujuan sedemikian daripada P. P tidak mempunyai pengetahuan tentang sebarang perjanjian lisan antara D dan TP berkenaan dengan barang yang dipulangkan. Walau apa pun, memandangkan P bukan pihak dalam perjanjian lisan yang dikatakan atau representasi antara D dan TP, P tidak terikat dengan mereka dan D tidak dilepaskan daripada kewajipan pembayarannya di bawah notis penyerahan hak (lihat perenggan 21–30).

(3) D tidak boleh bergantung kepada Akta Jualan Barang 1957 ('AJB') untuk mengelakkan pembayaran kepada P pada invois. Bukti menunjukkan D telah mengaku menerima barangan daripada TP dalam keadaan baik. Menurut s 41 AJB, pembeli tidak boleh mencabar kualiti atau kepatuhan barangan jika mereka berpeluang untuk memeriksanya semasa penerimaan tetapi tidak menggunakan hak tersebut. D menyalahkan Perintah Kawalan Pergerakan ('PKP') atas kelewatan pemeriksaan dan pemulangan barangan tidak boleh diterima kerana PKP tamat dan digantikan dengan Pelan Pemulihan Nasional seawal Jun 2021 sedangkan pemulangan barang tidak berlaku sehingga 17 Januari 2022 (lihat perenggan 36–40).

(4) D tidak mempunyai hak kebebasan atau penolakan dengan ekuiti berkenaan dengan invois kerana ia tidak memenuhi keperluan bahawa tuntutan balasnya mesti berkait rapat dengan tuntutan P dalam transaksi yang sama agar tolakan yang saksama beroperasi. Pembelaan D terhadap tolakan saksama adalah berdasarkan pemulangan barang dan pengeluaran nota kredit oleh TP. Walau bagaimanapun, tuntutan balasnya adalah berdasarkan tort penyalahgunaan proses, yang tidak berkaitan dengan invois yang dipertikaikan dan tidak memenuhi ujian untuk tolakan yang saksama. Walaupun pemulangan barang dan pengeluaran nota kredit dianggap sebagai sebahagian daripada tuntutan balas D, mereka tidak berkait rapat dengan tuntutan P dalam urus niaga yang sama kerana D telah menyimpan barang itu untuk masa yang lama tanpa penjelasan yang munasabah. D mengakui invois dan pesanan penghantaran dan oleh itu menerima keberhutangannya kepada P yang gagal dibayar (lihat perenggan 43–44).

(5) P berhak untuk meneruskan tindakan serentak terhadap D dan TP. D tidak mempertikaikan kesahihan surat ikatan serah hak dan notis serah hak dan mengaku berkewajipan untuk membayar hutang yang perlu dibayar di bawah invois kepada P. Oleh itu pihak-pihak terikat di bawah kedua-dua dokumen tersebut dan selagi hutang belum dijelaskan sepenuhnya. Berpuas hati, P berhak menuntut terhadap kedua-dua pihak secara serentak. Jumlah yang dituntut terhadap TP akan berkurangan dengan sewajarnya jika P menerima jumlah yang dituntut daripada D dan begitu juga sebaliknya. Oleh itu, tidak timbul soal kepelbagaian tindakan atau pelanggaran peraturan terhadap pemulihan berganda dan s 25(2) Akta Mahkamah Kehakiman 1964 tidak terpakai untuk kes segera (lihat perenggan 45–47 & 49–50).

(6) Mahkamah tidak menerima hujah D bahawa kemasukan TP sebagai pihak ketiga dalam tindakan segera membentuk 'beberapa sebab lain' untuk perbicaraan seperti A 14 k 3(1) KKM. Alasan D untuk memasukkan pihak ketiga adalah untuk membuktikan wujudnya perjanjian lisan yang didakwa antara dirinya dan TP. Walaupun perjanjian sedemikian wujud, ia tidak mengikat P atau menggantikan notis penyerahan hak (lihat perenggan 60–61).

(7) Memandangkan tuntutan balas D adalah berdasarkan dakwaan yang dibuat dalam pembelaannya terhadap tuntutan P dan mahkamah telah memutuskan dalam permohonan penghakiman ringkasan bahawa D tidak mempunyai pembelaan yang bermaruah, tuntutan balas itu telah dibatalkan kerana dianggap remeh, menyusahkan dan penyalahgunaan proses mahkamah (lihat perenggan 70).]

Cases referred to

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36; [1993] 4 CLJ 7, SC (refd)

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400; [1992] 1 CLJ 627, SC (folld)

Bank Perusahaan Kecil & Sederhana Malaysia Bhd (previously known as Bank Industry& Teknologi Malaysia Bhd) (that has vide an order of court dated 27 September 2005 taken over certain assets (including contract that is related to this claim) previously owned by Bank Pembangunan dan Infrastruktur Malaysia Bhd) v Uniti Films Sdn Bhd [2011] MLJU 1137; [2011] 1 LNS 601, HC (refd)

CIMB Islamic Bank Berhad v Ravichantiran a/l Ganesan [2020] MLJU 484, HC (refd)

Choo Jih Seang v Ramachandren a/l Narianasamy [2016] MLJU 1609; [2016] 1 LNS 579, HC (refd)

Double Acres Sdn Bhd v Tiarasetia Sdn Bhd [2000] MLJU 477, HC (refd)

Esso Petroleum Co Ltd v Milton [1997] 2 All ER 593, CA (refd)

Eushun Properties Sdn Bhd & Ors v MBF Finance Bhd [1992] 2 MLJ 137; [1992] 3 CLJ 1519, SC (distd)
Fujikura Federal Cables Sdn Bhd v Luen Wah Electric Co (M) Sdn Bhd [2009] MLJU 447, HC (refd)
Gan Seng Biang v Priyamas Export Corporation Sdn Bhd and Anor [2010] MLJU 1319; [2011] 3 CLJ 567, HC (refd)
Geldof Metaalconstructie NV v Simon Carves Ltd (Note) [2010] 4 All ER 847, CA (refd)
He-Con Sdn Bhd v Bulyah bt Ishak & Anor (as administrators for the estate of Nor Zainir bin Rahmat, the deceased) and another appeal [2020] 4 MLJ 662, FC (refd)
Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd [1989] 2 MLJ 149, SC (refd)
Kuwait Finance House (Malaysia) Berhad v Cheong Hooi Lin & Anor [2015] 1 LNS 605, HC (refd)
Lindley v Lacey (1864) 17 CBNS 578 (refd)
Modalku Ventures Sdn Bhd v Besi Gaya (Klang) Sdn Bhd [2022] MLJU 1293, HC (refd)
Nakano (M'sia) Sdn Bhd v Oriental Wealth (M) Sdn Bhd [2002] MLJU 379; [2002] 1 LNS 152, HC (refd)
National Company for Foreign Trade v Kayu Raya Sdn Bhd [1984] 2 MLJ 300, FC (folld)
Ng Seng Kee v Danaharta Urus Sdn Bhd [2008] MLJU 209, HC (refd)
Sabah Development Bank Berhad v Petron Oil (M) Sdn Bhd (formerly known as Exxonmobil Borneo Sdn Bhd) [2020] MLJU 228, FC (refd)
Scarf v Jardine (1882) 7 App Cas 345, HL (distd)
Tai May Chean v New Way Capital Sdn Bhd & Anor and another appeal [2020] 12 MLJ 471, CA (distd)
Personal Representatives of Tang Man Sit v Capacious Investments Ltd [1996] AC 514, PC (refd)
United Malayan Banking Corp Bhd v Tan Lian Keng & Ors [1990] 1 MLJ 280, HC (refd)
Voo Min En & Ors v Leong Chung Fatt [1982] 2 MLJ 241, FC (refd)

Legislation referred to

Civil Law Act 1956 s 4
Courts of Judicature Act 1964 s 25(2)
Evidence Act 1950 ss 91, 92, 92(b)
Rules of Court 2012 O 14, O 14 r 3, 3(1), O 18 r 19, 19(1)(a), (1)(b), (1)(c), (1)(d)
Sales of Goods Act 1957 ss 16, 41, 62, 63

Aufa Radzi (with Anson Liow) (Skrine) for the plaintiff.
Ivanpal Singh Grewal (Lee Ong & Partners) for the defendant.

Atan Mustaffa J:

INTRODUCTION

[1] This judgment concerns the plaintiff's summary judgment application (encl 8) against the defendant for recovery under a financing agreement, resulting from the defendant's non-payment of a sum based on invoices issued by the third party and subsequently assigned to the plaintiff, together with the plaintiff's striking out application (encl 12) against the defendant in respect of the defendant's counterclaim against the plaintiff in the same suit premised on the tort of abuse of process.

[2] After hearing these applications together, I dismissed both encls 8 and 12. This judgment contains the full grounds for my decision.

BACKGROUND FACTS

[3] The plaintiff, a financier, provided Able Enterprise (M) Sdn Bhd ('Able'), the third party in this action, with a note issuance (line facility) for RM1,500,000 ('the financing facility'). This arrangement was governed by a set of security documents, collectively termed 'the transaction documents', which included the primary agreement, note issuance (line facility) agreement cum guarantee dated 30 January 2019 and four supplemental letters of offer.

[4] In relation to the transaction above, Able assigned all its rights, titles, and interests in the transaction documents to the plaintiff by a deed of assignment of receivables dated 30 January 2019 ('the deed of assignment'). This assignment encompassed the receivables under the invoices due to Able. On 3 August 2021, there were revisions to certain terms of the deed of assignment via an email dated 3 August 2021 from the plaintiff to Able entitled 'upgrading of terms and conditions of the deed of assignment'.

[5] Additionally, Able executed a power of attorney in favour of the plaintiff on 30 January 2019. This allowed the plaintiff to act on Able's behalf in matters related to the assigned receivables. At the same time, a notice of assignment dated 30 January 2019 ('the notice of assignment') was sent by Able to the defendant, directing it to remit future payments to a designated account specified by the plaintiff ('the designated account'). This notice included a stipulation regarding a 14 day period for any invoice objections.

[6] Between September and November 2021, a series of invoices were issued by Able to the defendant. These invoices indicated that payments should be made to the designated account. As of 5 May 2022, there was an unpaid amount recorded at RM1,235,735.71 from the defendant.

[7] On 19 January 2022, the defendant returned goods to Able on the basis that they were unsuitable or defective based on an existing agreement between them. The items returned are detailed in ten invoices dated between 27 September 2021 to 8 November 2021 ('the disputed invoices'). Following this return, Able issued credit notes to the defendant on the same day for the same amounts as the disputed invoices.

[8] Separately, there was a default by Able concerning the financing facility. In response, the plaintiff sought payment of RM1,027,424.07. Subsequent to this, legal action was initiated by the plaintiff against Able on 12 July 2022 in Suit No WA-22NCC-328–07 of 2022 at the Kuala Lumpur High Court ('Suit 328') for the amount owing under the financing facility.

[9] Pursuant to the terms of the deed of assignment, the full sums owing under the invoices of RM1,235,735.71 should be paid to the designated account. After accounting for amounts owing to the plaintiff under the financing facility, any remaining funds would be directed to Able. Following a demand letter by the plaintiff's solicitors to the defendant dated 24 May 2022, the outstanding amount of the outstanding amount of RM 1,235,735.71 as at 5 May 2022 pursuant to the unpaid invoices from the defendant remained unpaid.

[10] The plaintiff then filed this action against the defendant on 13 October 2022, inter alia, praying for the sum of RM1,235,735.71 as at 5 May 2022 to be paid into the designated account. On 11 August 2022 the plaintiff filed an application in encl 8 under O 14 of the Rules of Court 2012 ('the ROC 2012') praying for the same. On 2 September 2022 the plaintiff filed an application in encl 12 applying to strike out the defendant's counterclaim under O 18 r 19(1)(a), (1)(b), (1)(c) or (1)(d) of the ROC 2012.

ENCLOSURE 8

Law on summary judgment (O 14 of the ROC 2012)

[11] It is trite that once an application under O 14 of the ROC 2012 is shown to have been correctly and properly filed, the burden shifts and thus rests on the defendant who desires to resist the application to raise a defence which shows a 'bona fide triable issue', in the sense of an issue which justifies and warrants the matter to be considered at the trial proper.

[12] Order 14 r 3 of the ROC 2012 provides that unless the defendant satisfies the court with respect to the claim, or the part of a claim, to which the application relates that:

(a) there is an issue or question in dispute which ought to be tried; or

(b) there ought for some other reason to be a trial of that claim or part.

The court may give such judgment for the plaintiff against the defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed.

[13] It is useful to refer once again to the often quoted decision of the former Federal Court in *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300 which ruled as follows:

> We think it appropriate to remind ourselves once again that in every application under O 14 the first considerations are: (1) whether the case comes within the order; and (b) whether the plaintiff has satisfied the preliminary requirements for proceeding under O 14. For the purposes of an application under O 14 the preliminary requirements are:
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> (i) the defendant must have entered an appearance;
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> (ii) the statement of claim must have been served on the defendant; and
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> (iii) the affidavit in support of the application must comply with the requirements of r 2 of the O 14.
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> ... If the plaintiff fails to satisfy either of these considerations, the summons may be dismissed. If however, these considerations are satisfied, the plaintiff will have established a prima facie case and he becomes entitled to judgment. The burden then shifts to the defendant to satisfy the court why judgment should not be given against him.

[14] The plaintiff has satisfied these preliminary requirements, and this is not disputed by the defendant. Thus, the burden is now firmly on the defendant to show that there is a triable issue that does not justify summary judgment to be entered against it. If the defendants can demonstrate even one triable issue, this court will not grant summary judgment. But it has to be a genuinely triable issue as would require a trial in order to determine it (see *Voo Min En & Ors v Leong Chung Fatt* [1982] 2 MLJ 241).

Issues

[15] There are a number of triable issues put forward by the defendant in this matter listed as follows:

(a) whether the agreement between the defendant and Able varies the provisions of the notice of assignment regarding who shall inform the plaintiff of the return of goods;

(b) whether the notice of assignment circumvents the protections afforded to the defendant by the Sales of Goods Act 1957 ('the SOGA') and is illegal for contravening the SOGA;

(c) whether the defendant is entitled to an independent set off between the defendant and Able in respect of the disputed invoices and the return of goods considering the defendant's agreement with Able despite the notice of assignment making provisions for trade debts, present and future rights including receivables;

(d) whether the plaintiff's claim against the defendant and the plaintiff's claim against Able in Suit 328 result in multiplicity of actions and against the rule of double recovery;

(e) whether future debts/future invoices such as those assigned under the notice of assignment are capable of being an absolute assignment within the provisions of s 4 of the Civil Law Act 1956;

(f) whether the defendant is legally required to return any goods to Able, despite the notice of assignment, because the rights and titles to the goods have not been assigned to the plaintiff;

(g) whether the legal title of any goods sold by Able to the defendant remains with the former and any return of goods must be transacted with Able and not the plaintiff; and

(h) whether the plaintiff can make a claim payment for goods from the defendant although the defendant did not take possession of and returned the same goods.

Analysis and findings of the court

Defendant's agreement with Able

[16] The defendant submitted that it has an agreement with Able, the assignor under the notice of assignment, that can only be proven by viva voce evidence which the plaintiff has put the defendant to strict proof in respect of the return of goods pursuant to the agreement.

[17] According to the defendant, before entering into the notice of assignment in January 2019, Able and the defendant agreed verbally that all payments related to the notice of assignment would go to the plaintiff until the factoring arrangement ended. It is also contended that the defendant and Able also agreed on procedures for returned goods and corresponding credit notes. The defendant maintains that it subsequently made payments exceeding RM12m to the plaintiff based on the notice of assignment and the agreement with Able and in January 2022, the defendant returned goods worth around RM1.2m to Able due to defects and received credit notes and never enjoyed the benefit of the returned goods.

[18] The defendant argued that it has a verbal agreement with Able regarding the notice of assignment, which the plaintiff demands to be strictly proven concerning the returned goods.

[19] In furtherance to the verbal agreement with Able, the defendant contended and submitted as follows:

(a) the agreement is important and admissible as evidence because it fills the gap in the notice of assignment which is silent on who is to inform the plaintiff of any objections to invoices;

(b) the agreement is also relevant as the defendant only executed the notice of assignment because of the agreement and it is a fundamental part of the defendant's participation in the factoring arrangement;

(c) oral evidence is necessary to determine the validity of the agreement with Able, and the defendant should be allowed to prove it at trial;

(d) pursuant to the agreement with Able, the defendant accepted the return of goods, and as a result, Able issued credit notes to the defendant for the disputed invoices; and

(e) the plaintiff's complaints about the return of goods should be directed at Able, not the defendant, as it acted in accordance with its agreement with Able.

[20] Pertinently, the defendant raises a triable issue: 'Whether the agreement between the defendant and Able varies the provisions of the notice of assignment regarding who shall inform the plaintiff of the return of goods'.

[21] The court does not accept the defendant's submissions and finds that there is no triable issue relating to this point.

[22] The defendant cannot raise the verbal agreement due to the parol evidence rule as provided under ss 91 and 92 of the Evidence Act 1950. See *He-Con Sdn Bhd v Bulyah bt Ishak & Anor (as administrators for the estate of Nor Zainir bin Rahmat, the deceased) and another appeal* [2020] 4 MLJ 662 (FC) where it was held that the rule preserves the genuineness and authenticity of a written document and prohibits the parties from amending the meaning of the document through oral declarations. Further, the High Court in the case of *United Malayan Banking Corp Bhd v Tan Lian Keng & Ors* [1990] 1 MLJ 280 held that extrinsic evidence of an understanding is inadmissible under the parol evidence rule.

[23] Clause 3 of the notice of assignment states:

> Notwithstanding the assignment and charge referred to above, we remain liable to perform all obligations assumed by us in relation to the Agreement and Modalku Ventures Sdn Bhd shall not be under any obligation to perform the obligations imposed on us thereby. This notice and the instructions contained herein are irrevocable and may not be modified or varied without the written consent of Modalku Ventures Sdn Bhd.

[24] The defendant therefore cannot take the position that the defendant and Able can form an agreement to modify the terms of the notice of assignment without the plaintiff's written consent as the notice of assignment clearly states that any modification or variation cannot be made without the plaintiff's written consent.

[25] The defendant referred to s 92(b) of the Evidence Act 1950 for the proposition that a separate oral agreement regarding a matter not specified in a written document may be proved if it does not conflict with the written document's terms. Section 92(b) reads:

> When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms:
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> Provided that —
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> (b) the existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved, and in considering whether or not this proviso applies, the court shall have regard to the degree of formality of the document;

[26] The defendant also cited the case of *Lindley v Lacey* (1864) 17 CBNS 578 for the proposition that in general, parties to a written contract are not prevented from proving that they have entered into an oral agreement regarding a matter not covered in the written contract.

[27] The defendant's invocation of s 92(b) of the Evidence Act 1950 and the citation of *Lindley v Lacey* are not applicable as the notice of assignment specifically states that no modification or variation can be made without the plaintiff's written consent.

[28] The case of *Eushun Properties Sdn Bhd & Ors v MBF Finance Bhd* [1992] 2 MLJ 137; [1992] 3 CLJ 1519 was cited by the defendant for the proposition that collateral oral agreements (such as the verbal agreement between the defendant and Able) is an exception to the rule forbidding

A extrinsic evidence to be used to contradict, vary, add to, or subtract from the terms of an agreement in the form of a document. It is easily distinguishable from the present case as here, there is no evidence to support that the plaintiff agreed to a variation of the terms in the notice of assignment regarding the return of goods and issuance of credit notes. There is also no evidence that the B defendant or Able requested the plaintiff's written consent before making the alleged verbal agreement. The verbal agreement was unknown to the plaintiff until the goods were returned and credit notes were issued without its written consent. Therefore, the defendant cannot rely on s 92(b) of the Evidence Act 1950.

C

[29] The defendant cannot take the position that it only agreed to execute the notice of assignment because of its agreement with Able as the plaintiff never made any oral representations to the defendant that induced the D defendant to sign the notice of assignment. Any alleged oral representations between the defendant and Able does not involve the plaintiff. If the defendant has any issues with Able it may take action only against Able. In any event, the defendant who heavily relies on the alleged verbal agreement in its defence has failed to provide evidence of it in its affidavit.

E

[30] Further, the oral agreement or representation does not supersede the notice of assignment, which imposes payment obligations on the defendant. Under the doctrine of privity of contract only the original party to a contract may sue or be sued upon it (see *Double Acres Sdn Bhd v Tiarasetia Sdn Bhd* F [2000] MLJU 477 (HC)). See also *CIMB Islamic Bank Berhad v Ravichantiran a/l Ganesan* [2020] MLJU 484 (HC) which states that a contract cannot confer rights or impose obligations upon any person who is not a party to the contract. As the plaintiff is not a party to the alleged oral agreement or representation between the defendant and Able, it has no obligations under it. G As the terms of the alleged oral agreement or representation cannot bind the plaintiff, the defendant is not released from its payment obligation under the notice of assignment.

[31] As the defendant admitted that the invoices were issued by Able to the H defendant and acknowledged the invoices as good for payment, any objections to the invoices should have come from the defendant who received and acknowledged the invoices.

Sales of Goods Act 1957

I

[32] The defendant submitted that cl 4 of the notice of assignment which provides 'Any objection to any invoices or its terms must be reported to Modalku Ventures Sdn Bhd within 14 days in writing after receipt of such invoices' is void because it is inconsistent with the express provisions of the

SOGA. In this respect the plaintiff impugns the return of goods by claiming a delay in the return of the goods that is inconsistent with cl 4 of the notice of assignment.

[33] The defendant contended and submitted as follows:

(a) the SOGA offers various protections to buyers of goods, including freedom from encumbrances and charges, matching the description of goods, fitness for purpose, return within reasonable time, right to inspect goods, and right to not return rejected goods;

(b) the notice of assignment cannot exclude protections afforded by the SOGA as it would be against public policy, unless it is explicitly stated in the contract (s 62 of the SOGA);

(c) the defendant retained the right to inspect the goods and return unsatisfactory goods within a reasonable time and Able accepted the return of goods on the conditions set by the defendant;

(d) fitness for purpose (s 16 of the SOGA) is a question of fact and whether the goods were of reasonable fitness depends on relevant circumstances;

(e) reasonable time for return of goods is also a question of fact (s 63 of the SOGA);

(f) the defendant is obligated to return the goods to Able, but only the debt was assigned by Able to the plaintiff, not the title of the goods;

(g) the defendant cannot be forced to pay for goods it has not taken possession of or returned and there is no longer any debt owed by the defendant to Able; and

(h) as the return of goods under SOGA raises many questions of fact, so the action must proceed to trial.

[34] In relation to this, the defendant raised the triable issue of 'Whether the notice of assignment circumvents the protections afforded to the defendant by the SOGA and is illegal for contravening SOGA'.

[35] The defendant's submission is not accepted, and the defendant has failed to raise a triable issue on this point.

[36] The defendant cannot rely on the SOGA in this case as the defendant confirmed that the goods received were in good condition by acknowledging the delivery order by signing on the delivery orders. This is apparent from delivery orders issued by Able to the defendant dated 27 September 2021, 20 September 2021, 13 September 2021, 1 October 2021, 6 October 2021, 12 October 2021, 21 October 2021, 18 October 2021, 15 November 2021

A and 8 November 2021. On each of the delivery orders, a representative of the defendant affixed a stamp and signature above the statement 'goods received in good condition'. The defendant cannot claim that the goods were returned and avoid its repayment obligations to the plaintiff.

B **[37]** Further, while s 41 of the SOGA establishes that a buyer is not considered to have accepted goods it has not previously examined unless he has had a reasonable opportunity to inspect them for conformity with the contract, it also protects both buyers and sellers from disputes arising after acceptance without examination. Section 41 of the SOGA reads:

C

> Buyer's right of examining the goods
>
> (1) Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of
>
> D ascertaining whether they are in conformity with the contract.
>
> (2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

E

[38] Therefore, if the buyer does not take the opportunity to inspect the goods and later raises issues or claims they do not conform to the contract, his claims may be less valid. Buyers cannot later challenge the quality or
F conformity of goods if they had the chance to inspect them but did not exercise that right.

[39] In *Fujikura Federal Cables Sdn Bhd v Luen Wah Electric Co (M) Sdn Bhd* [2009] MLJU 447, the High Court observed that s 41 of the SOGA stands as
G a protection for the seller as well as the buyer and is intended to arrest vexatious litigation. In this case, the court, applying s 41 of the SOGA, noted that the buyer neither rejected the goods nor lodged timely formal complaints, and despite having the opportunity to inspect the goods and request test certificates after delivery, the buyer failed to do so.

H

[40] Moreover, the court does not accept the reason given by the defendant to delay in inspecting and returning the goods. The defendant's explanation for the delay in returning the goods, which only took place after the delivery orders were signed, is based on the movement control order ('MCO') which allegedly
I caused the testing of the goods to commence only in early December 2021. However, the MCO ended and was replaced by the national recovery plan ('NRP') in June 2021 and all economic sectors were reopened in October 2021. The earliest disputed invoice was issued on 13 September 2021, and the last disputed invoice was issued on 15 November 2021. The return of goods

did not take place until 17 January 2022 although the MCO ended and was replaced by the NRP as early as June 2021.

Right of independent set off

[41] The defendant submitted that that it has the right of independent set off in respect of the invoices, notwithstanding the notice of assignment. The defendant contended and submitted as follows:

(a) the impugned invoices were future debts assigned by Able to the plaintiff under the notice of assignment;

(b) the defendant is entitled to equitable set off based on the test set out in the case of *Geldof Metaalconstructie NV v Simon Carves Ltd (Note)* [2010] 4 All ER 847, which has two elements: a close connection between the impugned invoices and the return of goods, and the unjustness of the plaintiff paying for goods it did not take possession of; and

(c) the defence of set off is not closed to the defendant because the return of goods allows the defendant to set off its debt with Able, and the set off was recognised by Able when it issued the credit notes to the defendant.

[42] In relation to this, the triable issue raised by the defendant is 'Whether the defendant is entitled to an independent set off between the defendant and Able in respect of the disputed invoices and the return of goods considering the defendant's agreement with Able despite the notice of assignment making provisions for trade debts, present and future rights including receivables'.

[43] The defendant's defence of equitable set off is not accepted and there is no triable issue raised in relation to it as the defendant has not met the requirement that the counterclaim must be closely connected to the same transaction as the plaintiff's claim. The defendant's counterclaim (regarding return of goods and issuance of credit notes) is not closely connected to the plaintiff's claim (disputed invoices). In *Esso Petroleum Co Ltd v Milton* [1997] 2 All ER 593 (English Court of Appeal), it was held that for equitable set off to apply the counterclaim must be closely connected with the same transaction as the claim and the mere fact that both claim and counterclaim arise from a single trading relationship is insufficient to support an equitable set off. Here, the defendant has not proven that the counterclaim is closely connected to the plaintiff's claim in the same transaction.

[44] The defendant's argument for the defence of equitable set off is mainly based on the return of goods and the issuance of credit notes. However, the defendant's counterclaim, which is based on the tort of abuse of process, does not relate to the disputed invoices and does not meet the test for equitable set

off. Even if the return of goods and issuance of credit notes are considered as part of the defendant's counterclaim, they are not closely connected to the plaintiff's claim in the same transaction as the defendant kept the goods for a long time without a reasonable explanation. The defendant acknowledged the invoices and delivery order, and therefore, accepted its indebtedness to the plaintiff which it failed to pay.

Multiciplicity of actions

[45] The defendant submitted that the plaintiff's action and the action against Able in Suit 328 amounts to multiplicity and violate the rule against double recovery. In this regard, the defendant contended and submitted as follows:

(a) the plaintiff is seeking to recover the same debt twice, once against Able in Suit 328 and once against the defendant in this action;

(b) the objective of damages is to put the injured party in the same financial position as it would have been without the incident;

(c) the defendant also relies on the equitable doctrine of election, arguing that the plaintiff has made an election to recover the debt from Able and cannot now also recover from the defendant; and

(d) the plaintiff cannot recover more than its loss and cannot simultaneously pursue multiple remedies for the same loss.

[46] In relation to this, the defendant raises the triable issue of 'Whether the plaintiff's claim against the defendant and the plaintiff's claim against Able in Suit 328 result in multiplicity of actions and against the rule of double recovery'.

[47] The court does not accept the defendant's submissions and find that there is no triable issue relating to this point.

[48] The defendant agreed and was aware that the agreement between the plaintiff and Able was a factoring agreement. A similar contention was raised in the case of *Modalku Ventures Sdn Bhd v Besi Gaya (Klang) Sdn Bhd* [2022] MLJU 1293 where the High Court held that the plaintiff in the suit has the right to make a claim against the defendant for the same debt and sums it is claiming against the assignor as this is akin to a financier or bank taking recovery actions against the borrower and the guarantor. There, the plaintiff's claim is similar to a claim based on a factoring agreement, which involves the assignment of debt from the 'client' (assignor) to the 'factor' (new creditor or assignee). The plaintiff has the right to institute and maintain a claim against the assignor and the defendant concurrently until the debt is fully satisfied.

Also, the court was of the view that there was no question of double recovery if the plaintiff was able to recover the same from the defendant as, if the financing facility is fully settled by the assignor then the plaintiff cannot recover the same from the defendant.

[49] Here, the defendant does not dispute the validity of the deed of assignment and notice of assignment and admitted to being obliged to remit the debts payable under the invoices to the plaintiff. The parties are therefore bound by the deed of assignment and notice of assignment at all times, and as long as the debts have not been fully satisfied, the plaintiff is entitled to claim against the defendant and Able concurrently. The amount claimed against Able will be reduced accordingly if the plaintiff receives the claimed amount from the defendant and vice versa.

[50] The defendant cites s 25(2) of the Courts of Judicature Act 1964 and the Court of Appeal case of *Tai May Chean v New Way Capital Sdn Bhd & Anor and another appeal* [2020] 12 MLJ 471 for the proposition that the courts have the power to dismiss or stay proceedings where the matter in question is res judicata, or in situations of multiplicity where the same cause of action or issues are raised before different courts, indicating an abuse of the court's process. As the case does not fall under the category of multiplicity of proceedings as held in the *Besi Gaya* case, s 25(2) of the Courts of Judicature Act 1964 and the case of *Tai May Chean* cited by the defendant do not apply.

[51] The case of *Personal Representatives of Tang Man Sit v Capacious Investments Ltd* [1996] AC 514 was cited by the defendant for the proposition that a plaintiff cannot recover an amount from one or more defendants that exceeds his loss actually supports the plaintiff. It also states that part satisfaction of a judgment against one person does not prevent the plaintiff from bringing an action against another who is also liable, but it does reduce the amount recoverable in the second action.

[52] The defendant's assertion that the plaintiff's 'election' to initially recover the debt solely from Able, before initiating this present lawsuit, lacks authoritative backing. While the defendant references the case of *Scarf v Jardine* (1882) 7 App Cas 345, suggesting that an individual's selection between two remedies becomes conclusive once communicated in a manner causing the other party to believe the decision is final, this case is not directly applicable. *Scarf* pertained to a customer opting to sue the new firm, wherein a partner from the previous firm was also a member. Contrastingly, our present scenario features a factoring agreement and a debt assignment between the involved parties. This arrangement empowers the plaintiff to pursue concurrent actions against both the defendant and Able.

Assignment of the goods to the plaintiff

[53] The defendant's position is that the plaintiff cannot make a claim payment for the goods from the defendant as future debts/invoices assigned under the notice of assignment are not considered an absolute assignment and the title to the goods remain with Able. As the defendant is legally obliged to return any goods to Able as the rights and titles have not been assigned to the plaintiff any return of goods must be transacted with Able, not the plaintiff. In this respect the defendant raised the following triable issues:

(a) whether future debts/future invoices such as those assigned under the notice of assignment are capable of being an absolute assignment within the provisions of s 4 of the Civil Law Act 1956

(b) whether the defendant is legally required to return any goods to Able, despite the notice of assignment, because the rights and titles to the goods have not been assigned to the plaintiff;

(c) whether the legal title of any goods sold by Able to the defendant remains with the former and any return of goods must be transacted with Able and not the plaintiff; and

(d) whether the plaintiff can make a claim payment for goods from the defendant even although the defendant did not take possession of and returned the same goods.

[54] The court finds that these are not triable issues.

[55] Cases firmly support the idea that assignments — even those involving future rights — can be absolute. This is particularly evident when the drafting of the assignment instrument uses the phrasing 'absolutely assigns', signifying the clear intention of the parties for the assignment to be absolute, not merely by way of charge.

[56] For instance, in the case of *Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd* [1989] 2 MLJ 149, it was stated:

> The deed clearly purports, and is intended in point of form to be an absolute assignment because of the use of the word 'absolutely'. The intention of the parties clearly was that it should be absolute in the sense that the assignee should have all the rights, title and interest of the assignor in the sale and purchase agreement.

[57] Additionally, the Federal Court, in *Sabah Development Bank Berhad v Petron Oil (M) Sdn Bhd (formerly known as Exxonmobil Borneo Sdn Bhd)* [2020] MLJU 228, has elaborated on the essence of 'assignment' and the weight carried by the terms 'absolutely assigns'. This reinforces the notion that

such wording exhibits the parties' intention to have the assignment treated as absolute, not simply as a charge.

[58] The very phrase 'assigned absolutely' is not foreign to the defendant. Indeed, it is expressly found in the notice of assignment. This notice has not only been duly acknowledged but also signed off by the defendant. An excerpt of this notice reads:

> Dear Sirs,
>
> Notice of Assignment of Receivables/Trade Debts
>
> 1. We hereby notify you that we have, by an assignment of receivables entered into between ourselves and Modalku Ventures Sdn Bhd, *assigned absolutely* all our trade debts, present and future rights including Receivables listed starting from 1 October 2018 with an outstanding amount of RM1,276,902.80 as at 31 December 2018 in the Statement Of Account as attached to this Notice of Assignment ('Receivables'). (Emphasis added.)

[59] The defendant's submissions on this point is therefore without merit. The assignment in this case, both by the weight of its language and the backing of established case law, is clearly absolute.

Third party notice

[60] The defendant submitted that the filing of the third party notice issued against Able is recognised as a 'some other reason' for trial as per O 14 r 3(1) of the ROC 2012. It is also argued that the inclusion of Able is compelling enough to constitute 'some other reason' for the trial of the action as it relates to the dispute between the parties and the acceptance of return of goods and issuance of credit notes for the said return.

[61] The court does not accept the inclusion of Able in this case as 'some other reason' to be a trial. The defendant's reason for including the third party, Able, is to prove the existence of the alleged verbal agreement, but even if it exists, it does not bind the plaintiff and supersede the notice of assignment for the reasons already stated above.

[62] The defendant cites the case of *Ng Seng Kee v Danaharta Urus Sdn Bhd* [2008] MLJU 209 for the proposition that the inclusion of a third party in proceedings is recognised as 'some other reason' for trial under O 14 r 3(1) of the ROC 2012. However, this case is not an authority for the proposition that the inclusion of a third party is is 'some other reason' to be a trial and is distinguishable from the instant case. In that case the third party was included to answer the various allegations of fraud, negligence and manipulation of the plaintiff's account.

[63] The verbal agreement which is the basis of the defendant's third party notice against Able is also irrelevant as explained above.

Conclusion

[64] Considering the totality of the facts and circumstances of the case as disclosed in the affidavit evidence, it was quite clear to me that the plaintiff had clearly met the preliminary requirements in an O 14 application in accordance with the principles established by *National Company for Foreign Trade v Kayu Raya Sdn Bhd* and further, applying the leading Supreme Court case of *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400; [1992] 1 CLJ 627. Accordingly, I held that the contentions of the defendant do not amount to triable issues or constitute any reasonable defence.

ENCLOSURE 12

[65] In encl 18, the plaintiff applied to strike out the defendant's counterclaim under O 18 r 19(1)(a), (1)(b), (1)(c) or (1)(d) of the ROC 2012.

Submissions of parties

[66] In brief, the plaintiff submitted that the defendant breached its payment obligation under a notice of assignment from Able, with the defendant having acknowledged this assignment and even made some payments to the plaintiff. The plaintiff maintained that despite this, the defendant has recently made unfounded claims about returning goods to Able to avoid further payments, with no supportive evidence. The plaintiff argued that the defendant's counterclaim, which echoes these arguments, appears as a mere attempt to escape debt payment. The plaintiff submitted that if the summary judgment application in encl 8 is allowed, the counterclaim should also be dismissed for being frivolous and an abuse of process.

[67] In summary, the defendant submitted that encl 12 should be dismissed due to several reasons: firstly, the action by the plaintiff has a collateral purpose and is an abuse of court process. Secondly, there are multiple triable issues, including the oral understanding between parties, the validity of the debt assignment, and the rights under the Sale of Goods Act 1957, among others. Thirdly, these complexities necessitate a full trial, allowing the defendant to present evidence against the plaintiff's claims. Lastly, it argues the plaintiff has not sufficiently demonstrated that the counterclaim is unjustified or an abuse of the court process.

Analysis and findings of the court

[68] The defendant's counterclaim is premised on the tort of abuse of process. The defendant contended that the plaintiff does not have a claim against the defendant but commenced this suit against the defendant for a collateral purpose and/or is an abuse of court process relying on all that is pleaded in its defence.

[69] In essence, the defendant contended that it is entitled to return unsuitable and/or defective goods to Able and cannot be made to pay for the amount on the disputed invoices as it never enjoyed the benefits of the goods. The defendant also claims that the plaintiff had full knowledge that there was no debt outstanding and payable to the plaintiff by the defendant and that the plaintiff is attempting a double recovery by bringing a similar action against Able in Suit 328.

[70] As the defendant's counterclaim is based on the allegations made in its defence to the plaintiff's claim and the court has determined in the summary judgment application that it does not have a meritable defence, it is warranted that this counterclaim be struck out as it is frivolous, vexatious, and/or an abuse of the court process. Reinforcing this stance, several precedents can be highlighted. For instance, in *Kuwait Finance House (Malaysia) Berhad v Cheong Hooi Lin & Anor* [2015] 1 LNS 605 (HC), the counterclaim was struck out on identical grounds upon which summary judgment was granted. Similarly *Choo Jih Seang v Ramachandren a/l Narianasamy* [2016] MLJU 1609; [2016] 1 LNS 579HC) affirmed that if summary judgment favours the plaintiff, an intertwined counterclaim is consequently untenable. The High Court in *Nakano (M'sia) Sdn Bhd v Oriental Wealth (M) Sdn Bhd* [2002] MLJU 379; [2002] 1 LNS 152 reiterated this by holding that a counterclaim, already addressed in a summary judgment application, cannot be revived at a later stage. In another significant case, *Bank Perusahaan Kecil & Sederhana Malaysia Bhd (previously known as Bank Industry& Teknologi Malaysia Bhd) (that has vide an order of court dated 27 September 2005 taken over certain assets (including contract that is related to this claim) previously owned by Bank Pembangunan dan Infrastruktur Malaysia Bhd) v Uniti Films Sdn Bhd* [2011] MLJU 1137; [2011] 1 LNS 601 (HC), the doctrine of res judicata was applied, emphasising the binding nature of prior decisions and precluding the re-litigation of adjudged issues. Lastly, the judgment in *Gan Seng Biang v Priyamas Export Corporation Sdn Bhd and Anor* [2010] MLJU 1319; [2011] 3 CLJ 567 (HC) highlighted the application of res judicata when there was a conspicuous similarity between affidavits in two separate proceedings. These cases consistently uphold the courts' tendency to strike out counterclaims linked to already adjudged defences.

Conclusion

[71] Considering the totality of the facts and circumstances of the case as disclosed in the affidavit evidence, it was quite clear to me that the plaintiff had met the requirements in an O 18 r 19 ROC 2012 application in accordance with the principles established by the locus classicus *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7 (SC). The defendant's counterclaim is struck out as it is frivolous, vexatious, and/or an abuse of the court process. Accordingly, I allowed encl 12.

Enclosures 8 and 12 allowed.

Reported by Ashok Kumar